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7 HARTFORD FIRE INSURANCE
8 COMPANY,

9 Plaintiff,

10 v.

11 TEMPUR-SEALY INTERNATIONAL,
12 INC., et al.,

13 Defendants.

14 Case No. 14-cv-01661-HSG

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28 **ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 53, 64

Pending before the Court are the parties' cross-motions for summary judgment. For the reasons stated below, Plaintiff's motion is DENIED and Defendants' motion is GRANTED.

I. BACKGROUND

The following material facts are not in dispute.

A. Insurance Policies

Plaintiff Hartford Fire Insurance Co. issued nine comprehensive general liability insurance policies to Defendants Tempur-Sealy International, Inc. and Tempur-Pedic North America, LLC, covering the time period from December 31, 2004 to March 1, 2013 ("Policies").¹ *See* Dkt. No. 56 ("Maynard Decl."), Exs. 1-9. The "Insuring Agreement" section of the Policies reads:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Section I ¶ 1(a).

¹ The parties agree that any variations in language across the Policies are not material and do not affect the Court's analysis. *See* Dkt. No. 53 ("Pl. Mot.") at 3 n.1; Dkt. No. 64 ("Def. Mot.") at 3.

1 The promised coverage encompasses “bodily injury” and “property damage” only if, in
2 relevant part, the “bodily injury” or “property damage” is caused by an “occurrence.” *Id.*
3 ¶ 1(b)(1). “Bodily injury” is defined as “bodily injury, sickness or disease sustained by a person,
4 including mental anguish or death resulting from any of these at any time.” Section V ¶ 5.
5 “Property damage” is defined as (1) “[p]hysical injury to tangible property, including all resulting
6 loss of use of that property,” or (2) “[l]oss of use of tangible property that is not physically
7 injured.” *Id.* ¶ 20. “Occurrence” is defined as “an accident, including continuous or repeated
8 exposure to substantially the same general harmful conditions.” *Id.* ¶ 16.

9 The Policy contains several exclusions. Relevant here, Exclusion (k) removes from
10 coverage “[p]roperty damage” to ‘your product’ arising out of it or any part of it.” *Id.* ¶ 2(k).
11 “Your product” is defined as “[a]ny goods or products, other than real property, manufactured,
12 sold, handled, distributed or disposed of by . . . You,” and includes “[w]arranties or
13 representations made at any time with respect to the fitness, quality, durability, performance or use
14 of ‘your product.’” Section V ¶ 24.

15 Additionally, Exclusion (m) removes from coverage “[p]roperty damage” to . . . property
16 that has not been physically injured, arising out of: (1) A defect, deficiency, inadequacy or
17 dangerous condition in ‘your product’ or ‘your work.’” Section I ¶ 2(m). However, “[t]his
18 exclusion does not apply to the loss of use of other property arising out of sudden and accidental
19 physical injury to ‘your product’ or ‘your work’ after it has been put to its intended use.” *Id.*

20 **B. Underlying Lawsuit**

21 On August 29, 2014, a number of individual consumers filed an amended class action
22 complaint against Defendants. *Todd v. Tempur Sealy Int'l, Inc.*, No. 3:13-cv-04984-JST (N.D.
23 Cal.) (“Underlying Compl.”); *see* Dkt. No. 63. The *Todd* plaintiffs allege that Defendants failed
24 to inform consumers that (1) pillows and mattresses manufactured and sold by Defendants “emit a
25 chemical odor caused by volatile organic compounds (‘VOCs’) off-gassing from” the products; (2)
26 the odor contains formaldehyde, a known human carcinogen; and (3) exposure to the odor
27 containing formaldehyde can and did trigger serious allergic reactions and asthma attacks in
28 consumers. Underlying Compl. ¶¶ 3, 5, 6, 8.

1 The Underlying Complaint contains numerous allegations regarding the injuries to person
2 and property suffered by the purchasers of Defendants' products. *See, e.g., id.* ¶¶ 65 ("The
3 noxious and toxic fumes from the mattress caused respiratory distress for me, nasal distress for my
4 husband."), 73 ("I had a severe allergic reaction to my new tempurpedic mattress and ended up in
5 the hospital."), 80 ("The off gassing is so bad it is seeped into everything in the bedroom."), 89
6 ("My pajamas also smelled of chemicals and all the clothing in my closet."). However, the *Todd*
7 plaintiffs also allege that they "do[] not seek damages for physical injuries." *Id.* ¶¶ 121-31.

8 "As a result of [their] payment and provision of consideration for a falsely, unfairly,
9 deceptively and misleadingly advertised, marketed, and sold product, [the *Todd* plaintiffs have]
10 suffered a cognizable injury." *Id.* ¶¶ 24-41. Had they known of the material facts that Defendants
11 allegedly omitted or "actively concealed" from consumers, the *Todd* plaintiffs allege that they
12 "would not have purchased [Defendants'] products for the retail price paid." *Id.* ¶¶ 96-113.

13 The *Todd* plaintiffs assert claims pursuant to various state consumer protection statutes on
14 behalf of themselves and eleven state subclasses (California, Illinois, Massachusetts, Maryland,
15 Missouri, North Carolina, New Jersey, New Mexico, New York, Washington, and Wisconsin). *Id.*
16 ¶¶ 121-31. For example, named plaintiffs Alvin Todd, Melody Todd, and Barbara Warren assert
17 claims under the Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and
18 Consumers Legal Remedies Act ("CLRA") on behalf of the California Class. *Id.* ¶¶ 134-70.

19 The *Todd* plaintiffs seek injunctive relief, "[a]ll recoverable compensatory and other
20 damages sustained by Plaintiffs," "[a]ctual and/or statutory damages for injuries suffered by
21 Plaintiffs in the maximum amount permitted by applicable law," punitive damages, and "such
22 other and further relief as this Court may deem just and proper." *Id.*, Prayer for Relief.

23 **C. This Litigation**

24 After initially agreeing to defend and paying the legal defense costs for Defendants in the
25 Underlying Lawsuit, Plaintiff informed Defendants on April 11, 2014 that it did not have a duty to
26 defend because the claims asserted in the Underlying Lawsuit were not potentially covered by the
27 Policies. *See* Maynard Decl. Exs. 29-30. Plaintiff filed this action for declaratory judgment on
28 April 10, 2014, seeking a judicial declaration that it has no duty to defend or indemnify with

1 respect to the Underlying Lawsuit. Dkt. No. 1. Plaintiff further seeks reimbursement for costs
2 already paid in defense of Defendants in the Underlying Lawsuit. *Id.* The parties filed cross-
3 motions for summary judgment. Dkt. Nos. 53 (“Pl. Mot.”), 64 (“Def. Mot.”). A hearing was held
4 on October 8, 2015. Dkt. No. 69.

5 **II. DISCUSSION**

6 **A. Legal Standard**

7 **1. Motion for Summary Judgment**

8 Summary judgment is proper where the pleadings and evidence demonstrate “there is no
9 genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of
10 law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material issue
11 of fact is a question a trier of fact must answer to determine the rights of the parties under the
12 applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute
13 is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving
14 party.” *Id.*

15 The moving party bears “the initial responsibility of informing the district court of the
16 basis for its motion.” *Celotex*, 477 U.S. at 323. To satisfy this burden, the moving party must
17 demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. To survive a motion
18 for summary judgment, the non-moving party must then show that there are genuine factual issues
19 that can only be resolved by the trier of fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736,
20 738 (9th Cir. 2000). To do so, the non-moving party must present specific facts creating a genuine
21 issue of material fact. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324.

22 The court must review the record as a whole and draw all reasonable inferences in favor of
23 the non-moving party. *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003).
24 However, unsupported conjecture or conclusory statements are insufficient to defeat summary
25 judgment. *Id.* Moreover, the court is not required “to scour the record in search of a genuine issue
26 of triable fact,” *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citations omitted), but rather
27 “may limit its review to the documents submitted for purposes of summary judgment and those
28 parts of the record specifically referenced therein.” *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d

1026, 1030 (9th Cir. 2001).

2 **2. Duty to Defend**

3 “An insurer has a very broad duty to defend its insured under California law.” *Anthem*
4 *Elecs., Inc. v. Pac. Emp’rs Ins. Co.*, 302 F.3d 1049, 1054 (9th Cir. 2002). According to the
5 California Supreme Court, “the insured is entitled to a defense if the underlying complaint alleges
6 the insured’s liability for damages *potentially* covered under the policy, or if the complaint might
7 be amended to give rise to a liability that would be covered under the policy.” *Montrose Chem.*
8 *Corp. v. Super. Court*, 6 Cal. 4th 287, 299 (1993) (emphasis in original). “Even if it is ultimately
9 determined no coverage existed, the insurer [refusing to defend] is liable for defense costs if there
10 was any potential of coverage under the policy during pendency of the action.” *Md. Cas. Co. v.*
11 *Nat’l Am. Ins. Co.*, 48 Cal. App. 4th 1822, 1828 (1996) (brackets in original).

12 To determine whether the insurer owes a duty to defend, courts first “compare the
13 allegations of the complaint—and facts extrinsic to the complaint—with the policy terms to see if
14 they reveal a possibility that the claim may be covered by the policy.” *Pension Tr. Fund for*
15 *Operating Eng’rs v. Fed. Ins. Co.*, 307 F.3d 944, 949 (9th Cir. 2002) (internal quotation marks
16 omitted). “Under California law, the insurer’s duty is not measured by the technical legal cause of
17 action pleaded in the underlying third party complaint, but rather by the *potential* for liability
18 under the policy’s coverage as revealed by the *facts* alleged in the complaint or otherwise known
19 to the insurer.” *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1267 (9th Cir. 2010) (internal
20 quotation marks omitted and emphasis in original). “It only matters whether the facts alleged or
21 otherwise known by the insurer suggest potential liability or whether they do not.” *Id.* at 1269.
22 “Any doubt as to whether the facts establish the existence of the defense duty must be resolved in
23 the insured’s favor.” *Id.* Moreover, “[i]f any of the claims in the underlying complaint are
24 covered, the insurer has a duty to defend the entire action.” *Manzarek v. St. Paul Fire & Marine*
25 *Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

26 The insurer bears a heavy burden to show that it does not have a duty to defend. While the
27 “insured need only show that the underlying claim *may* fall within policy coverage[,] the insurer
28 must prove it *cannot*.” *Montrose Chem.*, 6 Cal. 4th at 300. Indeed, “California courts have

1 repeatedly found that remote facts buried within causes of action that may potentially give rise to
2 coverage are sufficient to invoke the defense duty.” *Pension Tr. Fund*, 307 F.3d at 951. “Once
3 the insured makes a showing of potential coverage, the insurer may be relieved of its duty only
4 when the facts alleged in the underlying suit can by no conceivable theory raise a single issue that
5 could bring it within the policy coverage.” *Id.* at 949. An insurer’s duty to defend can generally
6 be resolved at the summary judgment stage. *Butler v. Clarendon Am. Ins. Co.*, 494 F. Supp. 2d
7 1112, 1122 (N.D. Cal. 2007).

8 **B. Analysis**

9 The parties dispute whether the Underlying Complaint alleges “damages because of
10 ‘bodily injury’ or ‘property damage’ . . . caused by an ‘occurrence.’” Policies Section I ¶ 1.

11 **1. Damages Because of Bodily Injury or Property Damage**

12 The Underlying Complaint contains almost 18 pages of detailed factual allegations
13 describing the bodily injuries and property damage caused by Defendants’ defective mattresses.
14 Underlying Compl. ¶¶ 64-94. All of the *Todd* plaintiffs’ claims incorporate and derive from these
15 allegations. In other words, if Defendants’ defective products had not allegedly caused bodily
16 injury or property damage, then Defendants would not have been able to allegedly misrepresent
17 the products’ ability to cause such injuries or damage. On their face, then, the “facts alleged” in
18 the Underlying Complaint clearly demonstrate “the potential for liability under the policy’s
19 coverage.” *Hudson*, 624 F.3d at 1267 (internal quotation marks and emphases omitted).

20 Plaintiff argues, however, that it has no duty to defend because the Underlying Complaint
21 does not allege specific *claims* for bodily injury or property damage. In the absence of explicitly
22 pled claims, Plaintiff contends that Ninth Circuit and California authority requires that the
23 otherwise broadly construed duty to defend not extend to “any imaginable amended claim.” Dkt.
24 No. 65 (“Pl. Opp.”) at 15. The Court disagrees with Plaintiff’s reading of this authority.

25 In *Gray v. Zurich Insurance Co.*, the California Supreme Court observed:

26 Defendant [insurer] cannot construct a formal fortress of the third
27 party’s pleadings and retreat behind its walls. The pleadings are
28 malleable, changeable and amendable. . . . Since modern procedural
rules focus on the facts of a case rather than the theory of recovery
in the complaint, the duty to defend should be fixed by the facts

1 which the insurer learns from the complaint, the insured, or other
2 sources. An insurer, therefore, bears a duty to defend its insured
3 whenever it ascertains facts which give rise to the potential for
liability under the policy.

4 65 Cal. 2d 263, 276-77 (1966).

5 Subsequent decisions have limited the scope of *Gray*, qualifying it
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7 by the commonsense proposition that “[a]n insured may not trigger
8 the duty to defend by speculating about extraneous ‘facts’ regarding
9 potential liability or ways in which the third party claimant might
amend its complaint at some future date. . . . Thus, the issue[] . . .
[is] what facts [the insurer] knew at the time [insureds] tendered the
defense of the [underlying] lawsuit, both from the allegations on the
face of the third party complaint, and from extrinsic information
available to it at the time; and whether those known facts created a
potential for coverage under the terms of the [p]olicy.”

10 *Low v. Golden Eagle Ins. Co.*, 99 Cal. App. 4th 109, 113 (2002) (quoting *Gunderson v. Fire Ins.*
11 *Exch*, 37 Cal. App. 4th 1106, 1114 (1995)); *see also Sony Comput. Entm’t Am. Inc. v. Am. Home*
12 *Assurance Co.*, 532 F.3d 1007, 1020 (9th Cir. 2008) (“California courts have held that no duty to
13 defend attaches where, as here, the third party complaint did not allege the type of damages
14 covered by the policy, and the class representatives explicitly disavowed any interest in the type of
15 damages covered by the policy.”); *The Upper Deck Co., LLC v. Fed. Ins. Co.*, 358 F.3d 608, 615-
16 16 (9th Cir. 2004) (“To support a finding of potential liability, the plaintiffs would need to allege
17 new facts of bodily injury. Mere speculation that the plaintiffs could or will allege such facts does
18 not give rise to a duty to defend.”) (emphasis in original).

19 But the *Gunderson*, *Low*, *Upper Deck*, and *Sony* cases are all distinguishable from the
20 present one on the same basis: none of the underlying complaints in those cases actually *alleged*
21 detailed facts that would support covered claims for bodily injury or property damage. In
22 *Gunderson*, the complaint “alleged no facts showing a potential for coverage,” and “[t]he extrinsic
23 ‘facts’ regarding potential liability for property damage [came] from speculation about how [the
24 third-party plaintiff] might have (but did not) amend her complaint at some future date.” 37 Cal.
25 App. 4th at 1117. In *Low*, the only relevant allegation identified by the California Court of Appeal
26 read: “[P]laintiff . . . has purchased and consumed Metabolife 356 which were [sic] manufactured
27 and distributed by the defendants named herein, without disclosure to her that these diet drugs
28 were extremely dangerous to her health.” 99 Cal. App. 4th at 112 & n.3. Thus, the underlying

1 complaint in *Low* did not actually allege that the plaintiff suffered any bodily injury. In *Upper*
2 *Deck*, the underlying complaint did “not allege sufficient facts to give rise to a claim for bodily
3 injury.” 358 F.3d at 615 (“The injuries alleged for the violation of gambling statutes are not for
4 bodily injury, the type or nature of injuries covered by the insurance policy. Rather, the complaint
5 alleges injury to the plaintiffs’ business or property . . .”). The insured “claimed that, although
6 the lawsuit was styled as a RICO suit, it could have been construed or amended to assert damages
7 for personal injury to children as a result of a gambling addiction,” *id.* at 610, but the Ninth Circuit
8 found that “an insurer would need to be clairvoyant to read ‘addiction’ [and related bodily injury]
9 into this underlying complaint,” *id.* at 615. Finally, in *Sony*, “the customer complaints of scratches
10 and other damage to discs—which could potentially establish physical damage—were never
11 incorporated into the third party lawsuit.” 532 F.3d at 1020-21.

12 In *Low*, *Gunderson*, *Upper Deck*, and *Sony*, “[t]o support a finding of potential liability,
13 the plaintiffs would need to allege *new facts* of bodily injury.” *Upper Deck*, 358 F.3d at 615
14 (emphasis in original). But here, the Underlying Complaint already includes 18 pages of
15 allegations detailing the factual basis for a potential covered claim. As such, and unlike the cases
16 cited by Plaintiff, this is not a case where the Underlying Complaint fails to allege “the nature and
17 kind of risk or injury covered by the insured’s policy.” *Upper Deck*, 358 F.3d at 613. Plaintiff
18 cannot protest here that Defendants have “no reasonable expectation of coverage for a type of
19 damage not alleged in the underlying complaint,” given the thirty paragraphs of factual allegations
20 in the Underlying Complaint that describe the exact type of bodily injury and property damage
21 covered by the Policies. *Id.* at 614. No clairvoyance is required to see the factual allegations of
22 bodily injury and property damage in the Underlying Complaint.

23 Plaintiff further argues that the *Todd* plaintiffs’ explicit allegations that they “do[] not seek
24 damages for physical injuries,” Underlying Complaint ¶¶ 121-31, negates any duty to defend. The
25 Ninth Circuit has recognized that “California courts have held that no duty to defend attaches
26 where . . . the third party complaint did not allege the type of damages covered by the policy, *and*
27 the class representatives explicitly disavowed any interest in the type of damages covered by the
28 policy.” *Sony*, 532 F.3d at 1020 (emphasis added). But here, as described above, the Underlying

1 Complaint *does* allege the type of damages covered by the Policies, making this case
2 distinguishable from *Sony* and the California authority cited therein. The key distinction is that
3 the Underlying Complaint already contains factual allegations sufficient to support a covered
4 claim, revealing a clear potential for liability. *See Hudson Ins. Co.*, 624 F.3d at 1267-68 (“[T]he
5 *Gunderson* line of narrow ‘speculation’ cases . . . concluded that there was no potential for
6 coverage, not because the complaint did not list a particular legal cause of action, but because the
7 complaint did not allege *any facts* supporting a covered cause of action.”) (emphasis in original);
8 *Olympic Club v. Those Interested Underwriters at Lloyd’s London*, 991 F.2d 497, 503 (9th Cir.
9 1993) (“Only amendments that would include new *causes of action* clearly supported by the facts
10 already pled in the complaint may support a finding of potential liability.”) (emphasis in original).

11 The Court is aware of only one other case that has dealt with this specific issue—*i.e.*,
12 whether a complaint that alleges facts supporting a potential claim for bodily injury or property
13 damage but also explicitly disclaims seeking recovery for any damages for physical injury triggers
14 a duty to defend. In that case, the court found in favor of the insured. *See Plantronics, Inc. v. Am.*
15 *Home Assur. Co.*, No. 07-cv-06038-PSG, 2014 WL 2452577, at *4 (N.D. Cal. May 30, 2014)
16 (“Because allegations in the underlying actions traced covered claims that could be added through
17 amendment, the underl[y]ing complaint[’]s amendment to seek damages because of bodily injury
18 was not speculative. Because the insurers were on notice of a possible amendment creating a
19 potential for coverage under the terms of the policy, the insurers were duty-bound to defend [the
20 insured] in the underlying action.”) (internal quotation marks omitted).² Under such
21 circumstances, the Court agrees that the *Todd* plaintiffs’ “purported disavowal of bodily injury
22 claims is not dispositive.” *Id.* at *4 n.39 (“The court will not permit the insurer to duck coverage
23 simply because the complainants sought the tactical advantage of bringing their claims through a
24 class action.”); *see also Dobrin v. Allstate Ins. Co.*, 897 F. Supp. 442, 444 (C.D. Cal. 1995) (“A
25 mere statement by the complainant that he does not intend to [amend his complaint to assert a
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28 ² In *Plantronics*, the underlying complaint alleged that the plaintiffs “seek damages for economic
injury and do not seek damages for any physical injury that may have been sustained by Class
members.” *Plantronics*, 2014 WL 2452577, at *1.

1 covered cause of action] is insufficient to establish as a matter of law that such a claim does not
2 exist. Only in the absence of facts supporting such a claim could [the insurer] have relied upon
3 such extrinsic information.”); *Montrose*, 6 Cal. 4th at 296 (“[T]he third party plaintiff cannot be
4 the arbiter of coverage.”).

5 Plaintiff further argues that, even if the Underlying Complaint alleges a potential for
6 liability, the Policies’ exclusions bar coverage of the asserted claims. First, Plaintiff argues that
7 Exclusion (k) bars coverage of any property damage to Defendants’ products—*i.e.*, the mattresses
8 themselves. The Court agrees, but finds that the Underlying Complaint alleges extensive damage
9 to property other than Defendants’ products. *See, e.g.*, Underlying Compl. ¶ 89. As a result,
10 Exclusion (k) does not bar coverage. Second, Plaintiff argues that Exclusion (m) bars coverage.
11 The Court finds that this exclusion is also inapplicable, since the Underlying Complaint contains
12 numerous allegations of loss of use of property due to the off-gassing odor produced by the
13 Defendants’ products, which injury is explicitly carved out of Exclusion (m). Policies Section I
14 ¶ 2(m).

15 Finally, even if an express *claim* for bodily injury or property damage were required to
16 demonstrate a potential for liability, the Court is not persuaded that the Underlying Complaint
17 “can by no conceivable theory” be interpreted to seek damages “because of” bodily injury or
18 property damage. *Pension Tr. Fund*, 307 F.3d at 951. Plaintiff does not cite any authority strictly
19 defining the term “because of” to mean “directly stemming from” or “for.” Given the ambiguity
20 of the term, and the “general principle that doubts as to meaning must be resolved against the
21 insurer,” the Court finds that the Underlying Complaint, as currently pled, “potentially seeks
22 damages within the coverage of the policy.” *Gray*, 65 Cal. 2d at 269, 275 (emphasis in original).

23 **C. Bodily Injury or Property Damage Caused by an Occurrence**

24 Under California law, an occurrence “is simply an unexpected consequence of an insured’s
25 act, even if due to negligence or faulty work.” *Anthem*, 302 F.3d at 1055 (“[A]ccidents need not
26 crash or clatter; they need only be unexpected consequences, and they may result even from the
27 insured’s own negligence.”). However, “[a]n intentional act is not an ‘accident’ within the plain
28 meaning of the word.” *Hurley Constr. Co. v. State Farm Fire & Casualty Co.*, 10 Cal. App. 4th

1 533, 539 (1992) (internal quotation marks and citation omitted). “When an insured intends the
2 acts resulting in the injury or damage, it is not an accident merely because the insured did not
3 intend to cause injury.” *Albert v. Mid-Century Ins. Co.*, 236 Cal. App. 4th 1281, 1291 (2015)
4 (internal quotation marks omitted). But “[a]n accident may exist when any aspect in the causal
5 series of events leading to the injury or damage was unintended by the insured and a matter of
6 fortuity.” *Id.* (internal quotation marks omitted).

7 Plaintiff argues that it does not have a duty to defend because “all of the causes of action
8 [in the Underlying Lawsuit] rest on the same factual allegations of fraud and deceit.” Pl. Mot. at
9 7. In essence, according to Plaintiff, the *Todd* plaintiffs allege that Defendants knew their
10 products were harmful, failed to disclose that fact, and misrepresented the safety of the products.
11 And because fraud and deceit are “necessarily and by definition[] intentional rather than
12 accidental,” Plaintiff argues that no “occurrence” occurred and therefore there is no potential for
13 coverage. *Id.* at 6.

14 But Plaintiff ignores the causal series of events leading to the damage sustained as a result
15 of Defendants’ alleged misrepresentations—*i.e.*, the manufacture and sale of allegedly defective
16 mattresses by Defendants. Here, as in *Anthem*, the Underlying Complaint does not “provide a
17 reason to think that [the alleged mattress defects] were expected.” 302 F.3d at 1051. This is
18 sufficient to demonstrate potential liability for an occurrence.

19 The negligent misrepresentation cases cited by Plaintiff are distinguishable from this case
20 because they did not involve any alleged accidental conduct on the part of the insured in the causal
21 series of events leading to the negligent misrepresentations. In *Safeco* and *Miller*, the underlying
22 complaints did not allege any potential occurrence because the insured could not possibly have
23 been held liable for injury resulting from property defects that it did not create, in the absence of
24 the alleged misrepresentations. See *Safeco*, 915 F.2d at 501 (underlying complaint alleged
25 misrepresentations regarding “unstable, shifting and moving earth,” “defective and inadequate
26 electrical wiring,” “defective plumbing,” and “severe water leakage” in the basement, and did not
27 allege that any of those property defects were caused by the insured); *Miller*, 41 Cal. App. 4th at
28 1148 (noting that the subject of the alleged misrepresentations, the defective plumbing in a home,

1 was “allegedly caused by the negligence of other defendants named in the [underlying
2 complaint]”). Here, although product defect causes of action are not explicitly pled in the
3 Underlying Complaint, there is a potential that such causes of action will be added by future
4 amendment, for the same reasons as described above. Unlike the insureds in *Safeco* and *Miller*,
5 Defendants could potentially be directly liable for injuries resulting from their defective products.

6 Finally, even though the *Todd* plaintiffs allege that the Defendants knew of the alleged
7 product defects “since at least March of 2007 and possibly earlier,” Underlying Complaint ¶ 4, the
8 Policies’ coverage began in 2004 and the *Todd* plaintiffs do not limit the scope of the putative
9 classes to any particular time period, *see, e.g., id.* ¶ 121. Therefore, there is a possibility that the
10 Underlying Complaint seeks damages resulting from Defendants’ accidental sale of defective
11 mattresses, which is sufficient to constitute a covered “occurrence.” *See Anthem*, 302 F.3d at 1056
12 (“The possibility that the defects were unexpected is enough to trigger the insurers’ duty to defend
13 even though the complaint failed to allege an accident.”).³

14 **D. Scope of Duty to Defend**

15 In their cross-motion for summary judgment, Defendants represent that Plaintiff refused to
16 pay for defense expenses incurred after the Underlying Complaint was filed and before it was
17 served. Def. Mot. at 25. Defendants contend that Plaintiff must cover those defense expenses
18 because the Policies obligate Plaintiff to defend against any “suit,” which is defined as “a civil
19 proceeding” to which the Policies’ coverage applies. Section V ¶ 21. Plaintiff does not respond to
20 Defendants’ contention in its opposition. Construing the terms of the Policies in favor of
21 Defendants, as it must, the Court finds that Plaintiff’s duty to defend incepted upon the filing of
22 the *Todd* lawsuit.

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³ Because the Court finds that Plaintiff has a duty to defend Defendants in the underlying lawsuit, Plaintiff’s arguments regarding reimbursement are moot.

1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiff's motion is DENIED and Defendants' motion is
3 GRANTED. The clerk shall enter judgment in favor of Defendants and close the file. Both
4 parties shall bear their own attorney fees and costs of suit.

5 **IT IS SO ORDERED.**

6 Dated: 1/20/2016

7 
8 HAYWOOD S. GILLIAM, JR.
9 United States District Judge